

Foreign Subsidies Regulation: A little Light in the Dark

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On July 12, the first of three instruments of the [Foreign Subsidies Regulation](#) (FSR) entered into force. As of this date, the Commission is entitled to initiate investigations into third country subsidies that distort the internal market either on its own initiative or based on a complaint by a third-party (so-called *ex officio* tool). Later this year, the notification-based instruments for mergers and bids in procurement procedures will enter into force on October 12. Then, companies exceeding the thresholds set by the FSR in the relevant market situations will be required to notify financial contributions granted by third countries to the Commission. Just in time for the entry into force of the *ex officio* tool, the [Commission adopted the Implementing Regulation](#) on July 10, which provides procedural information but also has a direct impact on the scope and interpretation of the FSR. The Commission also responded to the significant criticism raised by companies and associations, particularly with regard to the high administrative burden triggered by the FSR.

The FSR in a nutshell

The existing EU law regulates subsidies granted by EU Member States (so-called EU State aid rules). Third-country subsidies have not been subject to any control under EU law to date. From the Commission's point of view, this lack of control with regard to foreign subsidies results in competitive advantages for companies based in third countries, as they benefit from third-country subsidies much more frequently than EU companies whose home countries are subject to EU state aid law. The FSR was created to close the perceived regulatory gap and to subject third-country subsidies to control as well. Under the FSR, the EU Commission can review third-country subsidies using three different instruments: Mergers and public procurement procedures will be subject to scrutiny with a notification- and threshold-based system; companies must – as soon as they exceed the relevant thresholds – notify financial contributions they received from third countries to the Commission. These notification-based control mechanisms are also referred to as *ex ante* tools. In addition, the Commission has the possibility to *ex officio* investigate certain companies for third-country subsidies that allegedly distort the internal market, irrespective of specific market situations (for further information see our previous briefings on the subject [here](#)).

The Implementing Regulation

The draft Implementing Regulation published in February 2023 was subject to a hail of criticism in the public consultation of the draft. Concerns raised by stakeholders focused on the broad scope of application of the term "financial contribution" which meant that every purchase or supply relationship with a foreign State, or company attributable to a foreign State, was subject to the reporting obligations under the FSR, even where the relevant contract is on market terms.

The final version of the Implementing Regulation responds to some of the critical points mentioned in the public consultation and introduces the following innovations:

- Certain categories of financial contributions such as retail and purchase under "normal" market conditions (e.g. fairly and transparently executed public procurement procedures) or certain tax benefits are now excluded from the scope (see Annex I/II, Table 1, B. 6. a), b) and c)).
- Change in the threshold for contributions to be notified: only contributions exceeding EUR 1 million as an individual contribution must be notified (see Annex I/II, Table 1, B. 6. d)); previously, this amount used to be EUR 200,000 for M&A, and there was no threshold at all for public procurement procedures.
- Only financial contributions that fall within the scope of Article 5 FSR (contributions by which a distortion appears most likely) must be notified with detailed information (see Annex I, Section 5.2.; Annex II, Section 3.2.).
- Clarification that in public procurement only one notification (including separated lists for each notifying party) is submitted by the main contractor for all parties subject to notification requirements (Annex I, Annex II, Introduction, 3. (5)).
- Financial contributions that do not fall under Article 5 FSR only have to be notified if, in the case of public procurement procedures, the total value of a contribution (per third country) exceeds EUR 4 million in the last three years (see Annex II, Table 1, A. 3.) / in the case of mergers, this value is as high as EUR 45 million per third country (see Annex I, Table 1, A. 3.). The notifying party only must provide an overview over those contributions.
- More precision regarding the demarcation between notifications and declarations in public procurement (Article 29 (1) p. 2 FSR; a declaration has to be provided "in all other cases", meaning for all cases exceeding the EUR 250 million-threshold of Article 28 (1) lit. a), but not reaching EUR 4 million of foreign financial contributions by a single country) (see Annex II, Section 7.1.).

The Commission's Q&A

In addition, the Commission published a comprehensive list of Q&As that answer some (but not all) of the most urgent practical questions. For example, it has been clarified that mergers that fall within the scope of the FSR and are signed between July 12 (when the FSR enters into force) and October 12 (when the *ex ante* tools become effective) are reportable under the FSR if they are executed/closed after October 12. It also answers some questions on the qualification of certain benefits – in particular tax-related benefits.

What do companies need to look out for soon?

From July 12 on, companies must expect the Commission to use its new powers to launch an investigation into third-country subsidies that distort the internal market. It remains to be seen to what extent the Commission will use that instrument. These uncertainties do not exist for the two *ex ante* tools in procurement procedures and mergers, where the application-thresholds are clearly regulated.

Even though the new Implementing Regulation provides some reliefs, the FSR adds considerable additional red tape – especially for companies participating in large public procurement procedures or planning large mergers. The review of foreign financial contributions is not to be implemented as a pure monitoring exercise going forward, but companies also need to check for potential third-country contributions from the last three years. To be able to provide information to the Commission in the event of an *ex officio* investigation, the internal review of foreign financial contributions that the company may have received should not be left until the last moment. In addition, it is not only necessary to identify the financial contributions received by the company itself: Both for mergers and for procurement procedures, the financial contributions received by affiliated companies are also relevant. The term "financial contribution" is to be understood in the broadest possible sense: In addition to direct benefits, Article 3 (2) FSR also includes (with exemptions) tax benefits of any kind. Additionally, (potential) subcontractors and suppliers are also to be included in the threshold calculation as well as in the potential notification under the conditions of Article 29 (5), (6) FSR.

Preparation is now key and any company with dealings in third countries should take the following steps:

- Identification/designation of a central body to collect information on financial contributions received (including those of associated companies) and examination of reporting requirements.
- Identification of the information required for notifications/declarations, including the question as to which positions are covered by the term "financial contribu-

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tion"; in this regard, see the annexes to the Implementing Regulation. On this basis, a Request for Information (RFI) could be developed to create a consistent, company-wide workflow.

- Identify the entities inside and outside the company from which information might be needed (e.g., Legal, Accounting etc.).
- Distribution of the RFI and entry of the feedback data into a system based on the requirements of the annexes to the Implementing Regulation.
- Implementation of ongoing reporting mechanisms to keep the data up to date.
- For upcoming mergers and participations in procurement procedures: Check whether documents from additional entities are required (to be collected via RFIs), check the possibility of pre-notification, check the documents to ensure they are up to date.

BLOMSTEIN will continue to monitor developments closely and keep you informed. If you have any questions concerning the implications of the FSR on mergers, please feel free to contact [Max Klasse](#) or [Jasmin Mayerl](#). With questions about procurement law implications, do not hesitate to contact [Pascal Friton](#) or [Ramona Ader](#).